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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Arron Eugene Mowry,
10 Plaintiff,

No. CV 13-2053-PHX-RCB (SPL)

11 vs.

ORDER

12 Unknown Knight, et al.,
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14 Defendants.
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17 Before the Court is a Motion to Dismiss filed by Defendants Knight and Evans
18 (Doc. 12). The motion will be denied without prejudice to refiling.

19 In a recent decision, the Ninth Circuit held that the failure-to-exhaust defense must
20 be raised by summary judgment; it is no longer considered a matter of abatement to be
21 raised in an unenumerated Rule 12(b) motion. *Albino v. Baca*, --- F.3d ----, 2014 WL
22 1317141, at *1 (9th Cir. April 3, 2014), overruling *Wyatt v. Terhune*, 315 F.3d 1108,
23 1119-20 (9th Cir. 2003).

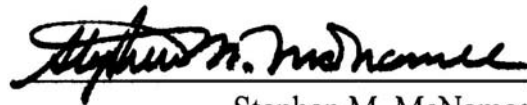
24 The pending Motion to Dismiss for failure to exhaust was filed as an
25 unenumerated Rule 12(b)(b) motion. Consequently, Plaintiff was not on notice of the
26 standard to be applied to the exhaustion issue, nor was he apprised of the requirements
27 under Federal Rule of Civil Procedure 56 and Local Rule of Civil Procedure 56.1. *See*
28 *Rand v. Rowland*, 154 F.3d 952, 960-61 (9th Cir. 1998) (en banc) (upon the filing of a

1 summary judgment motion, a pro se prisoner must be given notice of the requirements
2 under Rule 56). In addition, the Motion to Dismiss does not conform to the Local Rules
3 governing summary judgment. *See* LRCiv 56.1. The Court therefore declines to
4 construe Defendants' motion as one under Rule 56. Because neither party had the benefit
5 of the *Albino* decision, the motion will be denied without prejudice to refiling as a
6 summary judgment motion.

7 **IT IS ORDERED** withdrawing the reference to the Magistrate Judge as to
8 Defendants' Motion to Dismiss (Doc. 12) and it is **denied** without prejudice to refiling as
9 a summary judgment motion.

10 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike Plaintiff's Sur-
11 Reply (Doc. 37) is **denied as moot**.

12 DATED this 17th day of April, 2014.

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16 Stephen M. McNamee
17 Senior United States District Judge
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